K 1951

File No. O. Constitution/51 — part II

Legal Department

A **BRANCH**

Subject:—

Opinion given under the constitution of India.

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5 c.

Office of the R.L.A.

In his opinion No.2761 dated the 13th February 1951, the Additional Secretary to Government, opined that "if a primary school teacher stands as a candidate for election to the State Legislature in contravention of Rule 30(3) of the Bombay Civil Services Conduct, Discipline and Appeal Rules which have been applied to the Primary School teachers mutatis mutandis, he would be liable to be dealt with under rule 33 which prescribes the punishments to be imposed and such punishment may extend to dismissal from service." It appears that a Press-note was issued on the 5th February 1951 to the effect that under the provisions of the Bombay Primary Education Act, 1947, the provisions of the Bombay Civil Service Conduct, Discipline and Appeal Rules have been made applicable mutatis mutandis to the Primary Teachers and like Government servants, therefore, they cannot stand as candidates for or take any active part in any elections to the Legislature. On the basis of this Press-note, D.P.I. seems to have issued a circular accordingly. Shri M.V.Donde has now raised a Constitutional issue as follows:-

(1) Whether Primary teachers like Government servants cannot stand as candidates for or take active part in any election to the Legislature? and

(2)....

(2) Whether such restrictions as provided in Rule 30 sub-rule (3) of the Bombay Civil Service Conduct, Discipline and Appeal Rules would be in contravention of the Fundamental Right under Art. 19(1) (g) of the Constitution ?

It is true that the Constitution does not impose any disability on a primary school teacher disqualifying him from standing as a candidate for any State Legislature and under art. 19(1)(g) as a citizen such teacher is entitled to practise his profession or to carry on his occupation as a teacher. This fundamental right is subject to the qualification contained in clause (6) namely the right of the State to impose in the interest of general public reasonable restrictions on the exercise of the right conferred by the said sub-clause (g). Rule 30 sub-rule (3) of the Bombay Civil Services Conduct, Discipline and Appeal Rules which have been made applicable mutatis mutandis to the primary school teachers imposes a disability on Primary School Teachers in respect of their candidature for election to the State Legislature, and if in contravention of that provision a Primary School teacher contests any seat in the State Legislature there would be no bar and he would be entitled to hold the seat if he is elected. The only penalty that could be imposed on him would be the penalty provided under Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. It is true

that the disability contemplated by Rule 30 sub-rule (3) would be a kind of restriction on the Primary School Teachers, but the main question would be whether such restriction could be considered reasonable within the meaning of clause (6) of art. 19 of the Constitution. It is common knowledge that persons elected to the Legislature are required to devote their time and energy for the purpose of the State and ordinarily, it would not be possible for Primary School Teachers to devote such time without detriment to the interests of the Primary Education in the spread of which the public are interested. As matters it would certainly be the right of the School Board to regulate the terms and conditions of the service of the Primary School teachers. By applying the Bombay Civil Services Conduct, Discipline and Appeal Rules mutatis mutandis to the Primary School Teachers such teachers would not become servants of Government. They are the servants of the School Boards and it is perfectly competent for such Boards to regulate the terms and conditions of service of such teachers. The Legislature has given power to Government to make rules regulating their services. It would, therefore, follow that the conditions imposed under the Bombay Civil Services Conduct, Discipline and Appeal Rules would be deemed to be conditions imposed on

the Primary School Teachers as servants of the School Boards. In these circumstances, the restrictions imposed do not appear to be unreasonable and Art. 19 clause (1) sub-clause (g) does not appear to have been contravened. This legal position was considered by the Additional Secretary in his last opinion stated above.

Id/- J.R. Dhurandhar
14/5

Remembrancer of Legal Affairs.

U.R. to D.O. No. 7714, dated the 16th May 1951.

KAP/23-3.
4 c.

Office of the R.L.A.

The applicant, a Parsi woman married Mr. Voronzoff (a Russian by birth but now Stateless and living in India since 1936) on 22-2-1949. Mr. Voronzoff is treated as an alien. Article 5 of the Constitution provides as to who shall be considered as citizens of India at the commencement of the Constitution i.e. 26-1-1950. She would have been, in view of Article 5 considered a citizen of India, but for her marriage in February 1949 to an alien. The usual rule is that a married woman during coverture (unless judicially separated or divorced) has the same domicile as her husband. In view of that she cannnot under Article 5 be regarded as an Indian Citizen. Nor has Parliament yet made any law under Article 11 by reason of which Indian Citizenship can be acquired.

Id/- J.R. Dhurandhar
21/5

Remembrancer of Legal Affairs.

U. O. R. to P. & S.D. No.8051, dt. 22-5-51.

KAN/24-8.
4 c.

L.D.R.I.No.10314 dated 25-5-51.

x x x

Some communities have been included in the list of Backward Classes like "Chamber" and "Dhor" classified as ∦ schedule castes and as such they are entitled to various concessions sanctioned by Govt. for the Backward Classes. "Meralis" and "Kenkanas" are according to Enthoven, the sub-divisions of "Chambhars" and "Dhors" respectively, already recognised as Schedule castes but the people belonging to these sub-divisions are not allowed the various concessions granted by the Govt. on the ground that they have not been included in the list of Backward Classes. They have therefore represented that their parent communities of which they are sub-divisions, are already classified and recognised as schedule castes, and are given in the list. This contention of theirs is perfectly sound. The Backward Class Officer is of the opinion that as they are the sub-divisions of the communities, which are already recognised as Backward, there is no objection to treat them as backward. It may be stated here that the lists of schedule castes and Scheduled Tribes specified in the president's order can only be amended by a Law of Parliament vide Articles 341(2) and 342(2) of the Constitution of India. In order to get over this apparent legal difficulty, it has been proposed by the D.D. concurring with....

with the Backward Class Officer that persons belonging to such sub-divisions as "Harolia" and "Kankayas" etc. should first mention their caste "Chambaro" and "Dhoro" etc. and then mention their sub-caste "Harolia" and"Kankayas". If they adopt this method, they will be regarded as eligible for benefits and privileges of backward class community. By this procedure there are practically no additions to the list of Backward Class and the Govt. declared policy of not adding to the list of Backward classes is also not violated in any way.

The R.L.A. has been requested to advise in the matter.

x x x x

Sd/- J.S. Bindra
20/5/51

D.S.(Civil)

A Soon & returns

The proposal of the Backward Class Officer would present no legal difficulty.

Id/- R.T. K.
30/5

Addl. Secy. I agree, but the R.L.A. may also see.

Id/- .....
30/5

R.L.A. Id/- J.R. Dhurandhar
31/5

U.R. to H.D. No. 8613, dt. 1-6-1951.

KAN/24-8.
4 c.

Legal Department.

R.I. No.10709 dt. 1-6-1951.

Submitted.

Shri Jean Sarkis Goganian, a Turkish born Lebanese, who has settled in India has applied for an Indian passport and the question for consideration is whether he is an Indian citizen. Shri Goganian was born at Konia in Turkey in 1907 and he was naturalised as a Lebanese in 1933. He came to India on 7th January 1937 and has been carrying on business as a Ladies' Hairdresser in Bombay ever since 1939. In 1946-47 he applied for naturalization as a British subject and his application was recommended by the Provincial Government. The Government of India, however, declined to accept his application for the reasons given in their letter No.32/61/47-Poll E dated the 8th April 1947 and the matter appears to have rested there. On 7th October 1950, the applicant, however, obtained a domicile certificate from the Chief Presidency Magistrate evidencing his domicile in the State of Bombay and on the strength of this he appears to claim Indian nationality.

2. The Commissioner of Police considers that Shri Goganian cannot be considered to be an Indian in view of the ruling of Government of India conveyed in their letter No. 33/45/51-FII dated the 25th May 1951 and he has solicited orders of Government on the point whether he should be now registered as a foreigner. The Passport Officer has requested R.L.A. to advise.

x x x x

Sd/- H. P. Rege
16/6

D.S.(C), x x x x
R.L.A.

KAN/24-8.
4 c.

OFFICE OF THE R.L.A.

Constitution of India Article 5.

The case of Shri Goganian is similar to those of Shri E.E. Sherbanee and Miss Sherbanee considered by the R.L.A. in his opinions, Nos. 1283 dated the 18th January 1951 and 1632, dated the 27th January 1951 and there would be no objection to recognising him as an Indian citizen if Government is ~~fully~~ satisfied that he had abandoned his Lebanese nationality at the commencement of the Constitution.

Sd/- J.N. Khurandhar
19/6

Remembrancer of Legal Affairs.

U.O. to Passport Office, No. 9727, dated the 20th June 1951.

KAN/21-3.
4 c.

OFFICE OF THE R.L.A.

Constitution of India Article 5.

The case of Shri Goganian is similar to those of Shri E.E. Sherbanee and Miss Sherbanee considered by the R.L.A. in his opinions, Nos. 1180 dated the 18th January 1951 and 1632, dated the 27th January 1951 and there would be no objection to recognising him as an Indian citizen if Government is ~~fully~~ satisfied that he had abandoned his Lebanese nationality at the commencement of the Constitution.

Id/- J.N. Dhurandhar
19/6

Remembrancer of Legal Affairs.

U.H. to Passport Office, No. 9727, dated the 20th June 1951.

KAN/21-8.
4 c.

OFFICE OF THE A.L.A.

Attention is invited to A.L.A's opinion No.4925, dated 22nd May 1948 in which a similar question has already been considered. In view of the legal/position stated therein a Secretary of the District Rural Development Board would incur disqualification under clause (a, of .rticle 191(1) of the Constitution. If the intention is that he should not incur any such disqualification it would be necessary to include that officer in Bill No. XXX of 1951 which has been published. An amendment to the Bill will be necessary for the purpose.

Id/- J.R. DHUHANDHAR
23/6

Remembrancer of Legal Affairs.

U.H. to .. & F.D. No. 13103 dated the 25th June '51.

KAH/24-8.
4 c.

Legal Department.

The opinion of the Additional Secretary, L.D.No.6415, dated 21st April 1951 applies to this case also. The applicant Naseem Gore cannot be considered an Indian Citizen in view of his, after his return from Pakistan, not having got himself registered, as a citizen of India in accordance with Article 6(b)(ii) of the Constitution.

As he cannot be treated as an Indian Citizen the passport will have to be withdrawn.

Sd/- B.D. Mirchandani

Additional Secretary to Governmen

U.R. to Passport Office No.7096, dated the 4th May 1951.

KAN/24-8.
4 c.

OFFICE OF THE R.L.A.

There is no substance in the argument advanced by the Metropolitan Clearing Association in their letter at page 1 ante. A similar point was urged in the case of the Bank of Commerce Ltd., Khulna vs. Hripendra Nath Datta 1944 F.L.J.275. It was argued in that case that certain sections of the Bengal Money-lenders Act, 1940, constituted a serious interference with the conduct of banking business, an entry in List I in the Seventh Schedule to the Government of India Act, 1935 (entry 38) which now corresponds to entry 45 in the Union List. The Federal Court, which decided the case, however, held that it would be too much to say that every law, which in its operation might affect the property or interests of a bank just as it affects the property or interests of other persons would constitute an encroachment on entry 33 in List I. On a reasonable construction the entry must be limited to laws which affect the conduct of the business of banks qua banks. The question now raised however no longer survives in view of the amendment made in the Bombay Money-lenders Act, 1946 by Bombay Act No. XIII of 1951.

Sd/- J.R. DEHUJADHAR
12/7

Remembrancer of Legal Affairs.

U.R. to D.D. No. 11074, dated the 13th July 1951.

KAN/24-8.
4 Cs.

L.D.R.I. No. 12350 dt. 12-6-51.

Submitted.

One Shri Moshin Ramzanali, who is a minor aged about 13, has applied for grant of a certificate of identity to enable him to proceed to Pakistan to perform some religious ceremony. It is reported that the applicant was born in Bombay and has been residing here with his grandmother. His father and other relatives have, however, migrated to Pakistan immediately after partition and have permanently settled down there. The Police are of the opinion that the boy being a minor has inherited his parent's nationality and is entitled to the issue of a travel document as a presumptive Pakistani. The Passport Officer, however, considers that the boy is an Indian Citizen and he has requested L.D. to advise in the matter.

Sd/- N.P. Rege
15/6

D.S.(Civil. Id/- R.T.K.
15/6

KAN/24-3.
4 c. Addl. Secy. Id/- B.Da Mirchandani
15/6

R.L.A.

Office of the R.L.A.

Citizenship.
Constitution of India.
Article 5.

Under Article 5 of the Constitution, a person is a citizen of India if he has an Indian domicil and if he is born in India. There are other provisions in the article which are not material for the purpose of the present case. In this case the child was born in India. It is true that its father has gone to Pakistan and may have a Pakistan domicil. But the child is living with its grandmother, who must be deemed to be its guardian in the absence of the father. The child, therefore, can be deemed to have not changed its domicil of birth and to be a citizen of India.

Sd/- J.R. Dhurandhar
28/6

Remembrancer of Legal Affairs.

M.R. to P.O., No.10331, dated the 29th June 1951.

KAH/24-8.
4 c.

Legal Department.

Article 5 of the Constitution of India provides for the citizenship at the commencement of the Constitution. Article 6 provides for the rights of citizenship of certain persons who have migrated to India from Pakistan. Article 7 provides that "notwithstanding anything in articles 5 and 6, a person who has after the 1st day of March 1947 migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India; provided that nothing in this article shall apply to a person who after having so migrated to the territory now included in Pakistan has returned to the territory of India under a permit of settlement or permanent return issued by or under the authority of any law and every such person shall, for the purposes of clause (b) of article 6, be deemed to have migrated to the territory of India after the 19th day of July 1948". Shri Alimamal Abubeker Mohamed had his domicile in the Junagadh State now included in the territory of India. It appears that he had left India for Pakistan some time in 1948 and returned to India on a temporary permit dated 11-11-1948 valid up to 15-2-1949. He was granted an extension till 25-4-1949 in anticipation of the India High Commissioner's approval. Subsequently he obtained a non-objection certificate from India and went to Pakistan on 14-4-1949 and returned to India on a permanent return permit. The fact that he had gone to Pakistan and returned to India on a temporary permit would indicate that he had migrated

to Pakistan after the 1st day of March 1947. When he returned to India on a permanent return permit in June 1949 he would be deemed to have migrated to the territory of India after the 19th day of July 1948 within the meaning of the proviso to article 7. Consequently, article 6 clause (b) sub-clause (ii) will apply and since he admittedly made no application before the commencement of the Constitution in the form and manner prescribed by Government for registering him as a citizen, he cannot claim to be a citizen of India. He will have to wait for a legislation of the Parliament under article 11 and consider whether he can acquire citizenship. The view taken by the Passport Officer does not appear to be correct. Nor the assumption on which that view is based that migration contemplated by article 6 and 7 is something more than mere movement is correct.

Sd/- B.D. Mirchandani

Additional Secretary to Government

U.R. to P.O. No.6415; dated the 21st April 1951.

KAR/24-3.
4 c.

Office of the R.L.A.

The action of Government in reserving 7 per cent of the seats at Government Medical Colleges for candidates belonging to the backward classes is consistent with Article 15(4) of the Constitution. There is no provision of law however which requires such orders to be notified in the Bombay Government Gazette. But in order that courts should take judicial notice of the orders and as the orders are intended to give effect to the policy of Government to improve the condition of the backward classes of citizens, it would be desirable to give publicity to them by publication in the Offical Gazette. The draft may be shown to the Remembrancer of Legal Affairs before publication.

Sd/- J.R. Dhurendhar
6/7

Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D. No. 1727, dated the 7th July 1951

KAN/24-8.
4 c.

CONFIDENTIAL. Grant of Certificates of Identity and Indian Passports.

GOVERNMENT OF BOMBAY,
Political and Services Department;
(Passport Office.)
Circular No. 3047/51,
Bombay Castle, June 1951.

CIRCULAR OF GOVERNMENT.

It has come to the notice of Government that certain persons who had migrated to Pakistan after 1st March, 1947, have returned to India for permanent resettlement under a permit for permanent return or resettlement as provided by the Influx from Pakistan (Control) Act, 1949. In this connection, attention is invited to the proviso to Article 7 of the Constitution of India from which it will be seen that such persons cannot claim to be citizens of India merely by virtue of their return to India for permanent settlement unless they have registered themselves as required under Article 6(b)(ii) before the commencement of the Constitution. In case no such application has been made they will have to wait for a legislation of the Parliament under Article 11 of the Constitution and their position will have to be considered with reference to the provisions of the legislation when it is passed.

2. It is further pointed out that according to the provisions contained in Article 6 and its proviso persons (former residents of territories now included in Pakistan, who have migrated to India on or after 19th July 1948) cannot be held to be citizens of India unless they have been duly registered as such by an officer appointed by the Government. Such persons will also have to wait for a legislation of the Parliament under Article 11 of the Constitution.

3. Government has been advised that 'migration' within the meaning ...

meaning of Part II of the Constitution of India does not mean a mere temporary visit. It would not, therefore, be correct to hold that persons who have returned from Pakistan after a visit or trip should register themselves as required by Article 6(b)(ii) or the proviso to Article 7. It is true that in some cases there would be little to distinguish between a trip and migration, and an applicant may claim that his visit to Pakistan was a short-trip and not a migration; however, it is felt that the duration the purpose of visiting and other relevant circumstances would be useful criteria for distinction.

4. The Attention of all concerned is invited to the fact that Indian Passports and/or Certificates of Identity can only be issued to Indian Citizens. Government is, therefore, pleased to direct that applications for Passports and/or Certificates of Identity should be carefully examined by all concerned in the light of the provisions contained in Part II of the Constitution of India as elucidated in the foregoing paragraphs.

By order of the Governor of Bombay,

Passport Officer to the Government
of Bombay

KAN/24-3.
4 c.

Office of the R.L.A.

A revised Circular is forwarded herewith.

Sd/- J.R. Dhurandhar
14/6

Remembrancer of Legal Affairs.

U.R. to Passport Office, No. 9515, dated the 16th June 1961.

KAN/24-8.
4 c.

Office of the R.L.A.

Citizenship Constitution of India Art. 5(c).

The relevant provisions of the Constitution for consideration in Shri Duschek's case is article 5(c). That provision says that at the commencement of the Constitution, every person who has his domicile in the territory of India and who has been ordinarily resident in the territory of India for not less then five years immediately preceding such commencement shall be a citizen of India. Even assuming for the sake of argument that Shri Duschek has his domicile in India, i.e. he intends to make India his permanent home, he cannot be considered to have acquired the citizenship of India unless he has been ordinarily resident in the territory of India (as at present constituted, for not less than five years immediately preceding 26th January 1950. Shri Duschek has been in India since 30th January 1949 and before that date from 10th July 1946 to 30th January 1949 he was employed and residing at Lahore now in Pakistan. His residence in Pakistan for 2½ years cannot be considered as residence in India and taken into consideration in computing the period of five years. It may be that he stuck on in Pakistan after the partition to oblige his employers, but whatever the reason for his residence in Pakistan, that stay cannot be taken into account in computing the period of five years under Article 5(c). Nor can his internment at the Internment Camp at Dehra Dun from December 1941 to July 1946 be considered as residence in India. For as held by the Government of India in their letter No. CA/1/SR/45-III, dated 8th October 1948, a person who is an ~~illegible~~ inmate in any prison should not by reason thereof...

thereof be treated as residing therein for the purpose of his inclusion in the roll and the same analogy will apply in respect of residence in India for the purpose of acquiring citizenship. Even assuming for the sake of argument that this period of internment can be regarded as residence in India, what Article 5(c) contemplates is continuous residence in India for five years immediately preceding 26th January 1950 and not intermittent residence. The view taken by the Politi-
-cal and Service Department is, therefore, correct.

Sd/- J.R. Dhurandhar
3/7

Remembrancer of Legal Affairs.

U.O. to P. & S.D. No.10554 dated, 3rd July 1951.

KAH/24-8.
4 c.

Office of the R.L.A.

Citizenship. Constitution of India. Articles 5 (c).

It is true that Shri Duschek was by an order issued by the Central Government in exercise of powers under sections 3 and 3 of the Foreigners Act, 1940 directed to leave Dehra Dun and to proceed to Moghalpura; but it is clear from his history that previous to his detention at Dehara Dun he had no connection with India. Under Article 5(c) of the Constitution what is necessary is residence in India for the prescribed period and it is immaterial whether the absence from India was under compulsion or otherwise. Consequently, the period of his residence at Lahore cannot be taken into account for computing the period of his residence in India under Article 5(c). In his petition dated 4th July 1951, Shri Duschek has drawn attention to the fact that he remained in Pakistan to protect the interests of the Hindu firm, his employers and that he rendered service to the Hindu community in general. But, however, laudable that service may be, the fact remains that prior to 31st January 1949, he had no connection with India and his stay in India is only of a recent date. If Shri Duschek desires to acquire Indian nationality he should await the legislation that Parliament will promote under Article 11 of the Constitution.

Sd/- J.R. Dhurandhar
11/7

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 11002, dated the 12th July 1951

RAN/24-3.
4 C.

Office of the R.L.A.

Contract for supply of sulphate of ammonia

Constitution of India - Article 299(1).

It appears that towards the end of 1950 the Government of India allocated 5,000 tons of sulphate of ammonia to the Government of Bombay for distribution and directed that the stock should be taken from Messrs. Vika Chemical Works. The Director of Agriculture was entrusted with the disposal of the stocks by the Government of Bombay. Accordingly in December 1950 the Director of Agriculture contracted to supply to the member factories, i.e., the Deccan Sugar Factories Association, 5,000 tons of ammonium sulphate at Rs.325/- per ton on the terms and conditions settled between them. The member factories were directed to take delivery from Messrs. Vika Chemical Works of the stocks of sulphate of ammonia. The member factories paid in advance Rs.11 lakhs in respect of the price of the supplies. Messrs. Vika Chemical Works supplied about 670 tons to the member factories and thereafter they refused to make further supplies as required by the terms of the contract. In the meantime, the Government of India by their letter dated 2nd February 1951 directed Messrs. Manekrati and Co. to deliver to the Director of Agriculture, Poona, 4,461 tons in respect of the balance of the allocation already made, but that Company did not supply the stocks as directed. In the meantime, the Government of India found that there were enough stocks of ammonium sulphate in the Bombay State out of which stocks it was possible for the Bombay Government to meet its needs and con-

it cancelled the allocation of 4,464 tons and diverted the stocks to the Hyderabad State. In view of these circumstances, the Deccan Sugar Factories Association could not be given delivery of the stocks. On a peprecentation being made by the Association to Government for fulfilment of the contract entered into by them with Director of Agriculture, the Association was informed by Government on 8th May 1951 that no contract was made with the Association for the supply of 5,000 tons of sulphate of ammonia as contended by the Association and it was only an allocation and that allocation has now been cancelled and if the Association wants to be supplied from Government stocks, it will have to pay the price fixed by Government for the material. The Association has replied to the Government of Bombay that the Government is bound to honour the contract between them and the Director of Agriculture, Poona, and in default the matter will have to be taken to a court of law. The R.L.A. is requested to advise whether Government is bound by the contract between the Director of Agriculture and the Association.

2. Article 299(1) of the Constitution provides that all contracts made in exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor or Rajpramukh as the case may be and all such contracts and all assurances of property made in exercise of that power shall be executed on behalf of the President or the Governor or the

Rajpramukh by such persons and in such manner as he may direct or authorise. This provision is similar to section 175(3) of the Government of India Act, 1935. In this case a formal agreement was not executed on behalf of the Governor. It does not also appear that Government Resolution, Home Department, No.[illegible]/6 dated 26th January 1950 and the subsequent amending resolutions relating to the same matter empower the Director of Agriculture to execute contracts on behalf of Government. But so far as this particular case is concerned, it appears that although there were no written instructions to the Director of Agriculture, the Director who was entrusted with the disposal of the stocks of sulphate of ammonia kept Government fully aware of the disposal and Government itself approved his action. It also directed the stockists to deliver to the Deccan Sugar Association as per instructions of the Director. The Association had paid a deposit of Rs.1100,000/- which has been credited to Government. In these circumstances the present case will be held to be a case of executed consideration and Government will be held to be bound by the contract entered into by the Director, inspite of the fact that no formal instrument was executed. The view taken by Secretary, Agriculture and Forest Department (Shri Mehta) that this was a case of allocation and not one of an agreement to supply is entirely wrong. If the matter goes to a court of law, Government will be liable in damages to the Association. It will

therefore....."

therefore, be desirable to compromise the dispute.

Sd/- J.R. Dhurandhar
19/7

Remembrancer of Legal Affairs.

U.R. to A. & F.D. No. 699-Confl., dated the 18th July, 1951.

KAR/25-8.
4 c.

Legal Department.

Constitution of India.

Articles 15 & 29.

In Shrimati Champakam Dorairajan and another petitioner vs. The State of Madras (I.L.R. Madras, 1951) the Full Bench of the Madras High Court held that the Government's communal order reserving certain seats for Backward communities in educational institutions void inasmuch as it involved discrimination on the ground of caste, and that decision was confirmed by the Supreme Court. But since then the legal position has changed by the amendment of the Constitution by the Constitution (First Amendment) Act, 1951. Clause (4) of Article 15 of the Constitution, which has been inserted by the Constitution (First Amendment) Act, 1951, provides that nothing in the Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. It is, therefore, now competent for Government to reserve seats in Government educational institutions for the socially and educationally backward classes of citizens and Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes are enumerated in the Constitution (Scheduled Castes) Order, 1950, and the Constitution (Scheduled Tribes) Order, 1950, respectively. It will be open to Government to extend the educational concessions to other communities who in their opinion are socially and educationally backward.

Communities now classified as "Backward" and "Intermediate" can, if Government on scrutiny are satisfied that they are socially and educationally backward, be included in the list of such socially and educationally backward classes, if not already covered by the Scheduled Castes or Scheduled Tribes Order. The present classification into "Backward, Intermediate and Advance" will have to be revised in the light of above remarks.

Sd/- B.D. Mirchandani

Additional Secretary to Government.

U.R. to D.D. No. 11051, dated the 12th July 1951.

KAN/25-8.
4 6.

Nationality.

Constitution of India, Art. 5.

Mr. R. Landauer, though a German, appears to have been naturalised under the Indian Naturalisation Act, 1926, and issued a certificate No.123 dated 15th January 1935. Since then he appears to have been residing in India. To entitle him to citizenship of India what is necessary to be proved under article 5 of the Constitution is:

(1) He has his domicile in the territory of India; and

(2) (a) he was born in the territory of India, or

(b) either of his parents was born in the territory of India, or

(c) he has been ordinarily residing in the territory of India for not less than five years immediately preceding such commencement.

Condition (2)(c) has been satisfied by him as he appears to have been residing in the territory of India for not less than five years immediately preceding the commencement of the Constitution. So far as the first condition, namely, domicile, is concerned, it appears that the fact that he was given a certificate under the Indian Naturalisation Act, 1926, would be sufficient to prove his domicile for under section 3(1)(f) of that Act, he was required to state in his application that he intended, if the application was granted, to reside in India. Evidently he must have so stated in his application and on the basis of that statement the certificate under the Indian Naturalisation Act must have been issued to him. In the circumstances, it appears that he has satisfied both the conditions, namely, domicile and his residence in the territory of India for

not less than five years immediately preceding the commencement of the Constitution and as such he is entitled to the citizenship of India.

His wife, Mrs. Landauer, is also residing in India since 1930. By her marriage with Mr. Landauer she acquired the domicile of her husband. Consequently, she is also entitled to the citizenship of India.

Sd/- J.R. Dhurandhar
26/7

Remembrancer of Legal Affairs.

U.R. to Passport Office, No. 11921, dated the 26th July 1951.

KAN/25-8.
4 c.

Office of the R.L.A.

One Shri C.F. Bharucha, Head Clerk in the Office of the Taxing Master of the High Court, has represented to the Chief Justice that he cannot be retired at the age of 55 but that in view of rule 161(b) of the Bombay Civil Services Rules (edition of 1929) he should ordinarily be retained in service, if he continues efficient, upto the age of 60. In 1930 the Chief Justice by his order No. 1058, dated 1st November 1939 (copy at p. 9 ante), made with the approval of H.E. the Governor directed that with effect from 1st January 1940 ministerial servants of the High Court should retire from service when they attain the age of 55 years. One of the contentions raised by Shri Bharucha in his representation is that in view of the provisions of section 241(3) of the Government of India Act, 1935, he is entitled to appeal to the Chief Justice against the order of 1939 as that order results in terminating his appointment otherwise than on his reaching the age limit fixed for superannuation by the said Bombay Civil Services Rule 161(b). With respect to this contention the Under Secretary, Finance Department, in paragraph 4 of his note states that on the coming into force of the Constitution of India Shri Bharucha cannot exercise any such right of appeal as the Constitution does not provide for the making of any such appeal. The R.L.A. is requested to advise.

2. Under clause (b) of sub-section (2) of section 241 of the Government of India, 1935, read with section 242 the conditions of service of persons serving in the High Court was as prescribed by rules made by the Chief Justice. Clause

(a) of sub-section (3) of section 241 provided for the right of the relevant authority to alter rules governing the conditions of service of persons serving before the commencement of Part III even to their disadvantage. Clause (b) of that sub-section provided for the right of such servants to appeal to the same authorities to whom they could have appealed before 1st April 1937 or to any corresponding authority prescribed. It is true that the old rule 161(b) in the Bombay Civil Service Rules provided for the continuance in service of ministerial servants ordinarily upto the age of 60 years; and presuming that rule applied to Shri Bharucha it was open to him to appeal to the Chief Justice when by his order dated the 1st November 1939 he directed that ministerial servants should retire at the age of 55. No such appeal was preferred. The Constitution of India which came into force in the meanwhile does not provide for any such right of appeal on the part of persons serving in Civil services. It is true that article 313 of the Constitution continues in force all laws in force immediately before 26th January 1950 and applicable to any public service in so far as such laws are consistent with the provisions of the Constitution. However even taking for granted that in view of article 367, section 6 of the General Clauses Act, 1897, would come into play, it does not appear Shri Bharucha can claim to exercise that right after a lapse of nearly 12 years. On the contrary Shri Bharucha according to his own statement continued in the service of the High Court on the strength of two extensions granted in his favour by the Chief Justice. This shows that he had accepted the new conditions

of service (as modified in 1939) and given up his right of appeal, if any. There does not therefore appear any substance in the claim made by him in the concluding portion of his representation that he is entitled to appeal to the Chief Justice against the order dated 1st November 1939.

3. Apart from the position stated in paragraph 2 above it appears that Bombay Civil Service Rules 161(b) as it stood in the Edition of 1929 did not bestow a right on a Government servant to claim to continue in service till he attained the age of 60 years. That sub-rule provided "A ministerial servant may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient, up to the age of 60 years". This sub-rule has been explained in Note 3 to that rule which states inter alia that a Government servant has no claim to be retained in service up to the age of 60 years.

4. Shri Bharucha thus cannot calim to have a right to continue in service till he attains 60 years.

Sd/- J.R. Dhurandhar
13/7

Remembrancer of Legal Affairs.

U.R. to H.D. No.13004, dated 13th August 1951.

KAN/25-8.
4 c.

Office of the R.L.A.

The question discussed in this file is about the working days of the various courts. Honourable Minister Home Department in his minute at page 18 ante has expressed the view that all courts should work for all the six days of the week as other Government Offices. It appears that only the following Courts in Greater Bombay take Saturdays also off in addition to Sundays and other public holidays;

1. The High Court;
2. The City Civil Court;
3. The Sessions Court for Greater Bombay;
4. The Small Causes Court; and
5. The Presidency Magistrates Courts.

The Home Department in their note at pages 23-26 ante has examined this question with respect to each of the above Courts. It appears that this question has also been considered separately by Government in respect of some of the Courts; and also by the High Court Arrears Committee under the Chairmanship of the Hon'ble Shri Justice S.R. Das recently appointed by the Government of India. The Home Department does not therefore propose to reagitate the question so far as the High Court, the City Civil Court and the Sessions Court for Bombay area concerned; but proposes to address the High Court to issue instructions that the Small Causes Court and the Presidency Magistrates Courts should hold their sittings on all the days except Sundays and other public holidays. The papers are shown to the R.L.A. for remarks; but no specific question has been raised for consideration.

2....

2. The Court of Small Causes, Bombay is deemed, under section 6 of the Presidency Small Cause Courts Act, 1882 (XV of 1882), to be a Court subject to the superintendence of the Bombay High Court within the meaning of the Letters Patents and the Civil Procedure Code; and the High Court has in respect of that Court the same powers as it had under the Indian High Courts Act, 1861 (since repealed) and now under the Constitution of India in respect of Courts subject to its appellate jurisdiction. The superintendence of the High Court is continued under article 227 of the Constitution clause (2)(b) of which empowers the High Court to make and issue general rules of that Court. Section 32 of the Presidency Small Cause Courts Act, 1882, provides that the Small Causes Court shall, at the commencement of each year, draw up a list of holidays and vacations to be observed in the Court and shall submit the same for the approval of the State Government. It would, therefore, be feasible for Government to give effect to the Home Department proposal under section 32 so far as the Small Cause Court is concerned when the Government at the commencement of next year are approached for approval of holidays and vacations. It will, however, be advisable to consult the High Court and secure their concurrence.

3. As regards the Presidency Magistrates Courts constituted under section 6and 6A of the Criminal Procedure Code, 1898, they are, under section 17B of the Code, Criminal Courts inferior to the High Court. The High Court can, therefore, exercise superintendence over the Courts

(article 227 of the Constitution) and make and issue general rules for regulating the practice and proceedings of those Courts. The High Court, therefore, will have to be addressed on the subject of directing the Presidency Magistrates Courts to work on Saturdays."

Sd/- J.R. Dhurandhar
10/8

Remembrancer of Legal Affairs.

U.R. to H.D. No.12933, dated 10th August 1951.

KAN/25-8.
4 c.

Office of the R.L.A.

I am afraid I cannot agree with the view that the provisions of rule 31A of the D.C.S.R. are not attracted in this particular case. The Association has more than once made representation to Government on behalf of Government servants who are presumably its members regarding the conditions of their service. This situation has been created by the Association itself by overstepping its bounds. It will not be sufficient to inform the Association that such representation will not be considered by Government. Because even if such representation is not to be taken into account, it will create an awkward situation for Government, if Government servants are to be permitted to join an Association which may, as this Association has done, pose to represent Government servants and to agitate for the redress of their grievances. If P. & S.Deptt. does not wish to debar Government servants from becoming the members of this Association, it will be desirable to warn this Association that it cannot act as a representative of Government servants to put forward their grievances before Government. If it does so, it will be a breach of rule 31A of D.C.S.R. on the part of a

P.T.O.

Government servant to be or to continue to be

its member.

Sd/- J.R. Thurandhar
31/8

REMEMBRANCER OF LEGAL AFFAIRS.

KAN/25-8
4 c.

Office of the R.L.A.

It appears that by Government Resolution, Education Department, No.7037, dated 22nd October 1947 Government directed that the condition regarding domicile, if any, should be relaxed in favour of non-Muslim refugee students from Pakistan for their admission to Government or Government aided educational institutions in the Province. Similarly, by Government Resolution, Education Department, No.8330 dated 11th June 1948 the condition regarding the upper age limit for the purposes of admission of non-Muslim refugee students from Pakistan to the Government or Government aided educational institutions in the Province has been relaxed. These concessions have been extended year by year since then. The Under Secretary, Education Department, has now raised the question whether, in view of the Constitution of India, it would be legally feasible to continue the concessions.

Article 15(1) of the Constitution of India provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The latter article extends the benefit of equality before the law to all persons in the Indian Union irrespective of the fact whether or not they are citizens of the India, whereas the former extends the benefit only to citizens of India. All the displaced persons from Pakistan may or may not have acquired citizenship under the provisions of Part II of the Constitution and some of the displaced persons may possibly be Muslims. The aforesaid orders of Government contained in the Government Resolutions extend the concessions only to non-Muslim refugee students from Pakistan. As stated above

some of the refugee students from Pakistan may be Muslims, in which case the benefit of the aforesaid orders of Government regarding concessions would not be available to these Muslim refugee students from Pakistan. In view of these circumstances, it appears that the aforesaid orders of Government regarding concessions to non-Muslim refugee students from Pakistan would offend against article 15(1) of the Constitution inasmuch as they make a discrimination between non-Muslim and Muslim refugee students from Pakistan.

Sd/- J.R. Dhurandhar
24/8

Remembrancer of Legal Affairs.

U.R. to E.D. No. 13744, dated the 27th August 1951.

KAH/25-8.
4 c.

Office of the R.L.A.

It is no doubt true that article 19(1) (c) of the Constitution guarantees the formation of associations or unions. But clause (3) of the article permits the imposition of reasonable restrictions on this privilege. Rule 31A of the Bombay Civil Service Conduct, Discipline and Appeal Rules provides that no Government servant shall be a member, representative or officer of an association representing or purporting to present (represent) Government servants unless such association satisfies the conditions specified in the rule. One of these conditions is that the membership of the association shall be confined to a distinct class of Government servants and shall be open to all Government servants of that class. In other words, if the object of the association is to represent Government servants, its membership must be confined to that class and should not be open to any outsider. This rule is not in any way inconsistent with article 19(1)(c) of the Constitution. If the Association of the Scientific Workers under the colour of its objects No. 2 and 2A proposes to represent Government servants and to work for the redress of their grievances in the conditions of service, it will have to restrict its membership to Government servants only. If, however, it has

not so restricted, it will be a breach of rule 31A of the Bombay Civil Services Conduct, Discipline and Appeal Rules for any Government servant to be a member of the Association. This aspect of the question does not appear to have been considered in the note of the P. & S. Department at page 63 ante and it will be desirable to refer the case back to that Department for reconsideration.

Sd/- J.R. Dhurandhar
24/3

Remembrancer of Legal Affairs.

H.H. Health

56-L
24-3-51.

With.
2728/33 XI
G.R. P.& S.D.
3340/46
13-12-50

RAN/27-3.
4 c.

R.I.No.13793
3-7-51

In pursuance of an application made by the Collector of Poona, under Sect. 10(1) of the Bom. Court of Wards Act, 1905, for authorising him to take temporary custody and protection of the property left by the deceased Saranjamdar Shri Sarjerao Ramrao Jadhav Wagholikar, the D.J., Poona, passed an order authorising the Court of Wards, Poona, to take such steps and to make such order for the temporary custody and protection of the property of the deceased as the Court of Wards considered fit. It appears that on the death of the last holder of the Saranjam, Government resumed and regranted the Saranjam to the eldest minor son of Shri Sarjerao, mother being the guardian (G.R., P. & S.D. No. 494/46, dated 22-2-1950). The Collr. and Court of Wards, Poona, subsequently, moved Govt. to accord sanction to assume superintendence over the property of the late Saranjamdar under Sect. 4(1) of the Bom. Court of Wards Act, 1905, As certain Saranjam villages of the Estate in the East Khandesh and Nasik Districts had since been transferred to the Hyderabad State, the Collr. of Poona and the Commr., C.D. suggested that the Hyderabad State authorities should be requested to assume superintendence over the property of the deceased Saranjamdar lying within their jurisdiction and to remit the amount received from these villages to the Collr. and Court of Wards, Poona. By G.R., R.D. No. 4765/49, dt/ 28-5-1950, Govt. accorded sanction under Sect. 4(1) to the assump-

tion by the Court of Wards of the superintendence over the estate of the deceased Shri Sarjerao Jadhav. In R.D. letter No. 4765/42-F, dt/ 29-5-50, Govt. requested the Chief Secy. to the Govt. of Hyderabad to move his Govt. to assume superintendence over the estate situated in the villages transferred to Govt. and to remit the amount received from those villages to the Collr. and Court of Wards, Poona. As it was subsequently reported that the two villages, Ranshendre and Mukhangaon from Chaliagaon Taluka had also been transferred to the Hyderabad State and as they formed part of the estate of the late Saranjamdar, that State was requested to assume superintendence over these villages also, and the orders contained in G.R., R.D. No. 4765/49, dt/ 29-5-50 were suitably amended.

In his letter No. 24369, dt/ 6-12-1950, the Chief Secy., Hyderabad State, informed the Secy., R.D. that as a result of promulgation of the Hyderabad (Abolition of Jagirs) Regulation, 1358 F, all the Jagirs of the Hyderabad State have been taken under the superintendence of the Jagir Administrator in whom are vested the powers to fix commutation or other interim allowances under the rules, and that in pursuance of para 7 of the India and Hyderabad (Exchange of Enclaves) Order, 1950, the said Regulation extends to enclaves as well and consequently the estate of late Shri S.R. Jadh has authomatically passed under the control of the Jagir Administrator. As a result of this Regulation, the five Saranjam villages referred to in R.D. letter dt/ 29-5-50

were taken over by the Jagir Administrator. As regards the two other villages of Bamshindre and Khokangaon of East Khandesh Dist. transferred to the Hyderabad State, villages and the definition of Jagir does not include Inam lands, the matter is separately taken up with the Jagir Administrator.

In his letter No. W.R.D-505, dated 17-5-51, the Collr. and Court of Wards, Poona, inter alia states thus:-

"On inquiry it is understood from the Govt. of Hyderabad that the Hyderabad (Abolition of Jagirs) Regulation 1358 Fasli bearing No. LXIX of 1358 has been made applicable to these villages with effect from 2-12-1950 and since that date the villages have been taken over by the Govt. of Hyderabad under its administration".

He further states that Shrimati Sulochanabai widow of Sardarao Jadhavrao, and the mother of minor Saranjamdar has sent a draft representation to be made to the Govt. of Hyderabad requesting that the Hyderabad (Abolition of Jagirs) Regulation1358F should not be made applicable to the Saranjam Estate of the minor. In para 4 of his letter, the Collr. and Court of Wards requests Govt. orders, after consulting R.L.A., whether a representation should be made to the Govt. of Hyderabad as suggested by Shrimati Sulochanabai.

In his note dt/ 27-6-51 Secy., R.D. remarks:-

"Re: (iii) R.L.A. may see as proposed. But I do not see any objection to the lady making a representation to

the Chief Minister. I doubt, however, whether that Govt. has the power not to apply the Regulation to any particular estate, and even if it has taken that power, whether it will exercise it in favour of Shrimati Sulochanabai".

x

Id/- B.P. Bhangara
24-8

D.S. (Civil)

Id/- R.T.K
27/8

R.L.A.

KAN/27-8.
4.c.

Office of the R.L.A.

Seen and returned.

The view taken by Secretary, Revenue Department is correct. The Hyderabad (Abolition of Jaghirs) Regulation 1358 F provides for the abolition of all Jaghirs in the Hyderabad State, although section 5(1) thereof empowers the Government to fix different dates for different Jaghirs to transfer to Government the administration of the Jaghirs. It appears that the administration of the Jaghir villages of the minor son of the deceased Saranjamdar Shri Sarjerao Ramrao Jadhav Waghalikar, have been already taken over by the Hyderabad State under that Regulation. Consequently no useful purpose would be served by any representation proposed to be made by the mother of the minor to the Chief Minister of Hyderabad State requesting that the aforesaid Regulation should not be made applicable to the Jagir villages of the minor. However, this Government may forward the representation of the mother of the minor Saranjamdar to the Chief Minister of Hyderabad to consider the request for what it is worth.

Sd/- J.R. Dhurandhar
28/8

Remembrancer of Legal Affairs.

U.R. to R.D. No.13805, dated the 29th August 1951.

KAN/27-8.
4 c.

Office of the R.L.A.

The Ahmedabad Forest Contractors at a conference passed a resolution protesting against Government's policy of alloting forests on preferential basis to Adiwasis Societies, thereby causing discrimination between citizens.

2. Article 15 of the Constitution prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them. This article has since been amended to provide that nothing in this article shall prevent the State from making any special provision for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Adiwasis are the jungle and hill tribes called Bhils, Katkaris, Varlis, Thakurs and Konknas. These tribes are deemed to be Scheduled Tribes under the Constitution (Scheduled Tribes) Order, 1950. To improve their condition socially and economically Government organized Co-operative societies of Adiwasis and allotted to them forest coupes on reasonable terms (see report on the Working of the Forest Labourers' Co-operative Societies). Government's policy in discriminating in favour of the Adiwasis Societies which are Scheduled Tribes falls under the new clause 4 of article 15 of the Constitution and cannot therefore be regarded as unconstitutional.

Sd/- J.R. Dhurandhar
14/8

Remembrancer of Legal Affairs.

U.R. to D.D., No.13140, dated the 17th August 1951.

KAN/27-8.
4 c.

Office of the R.L.A.

The question for R.L.A's consideration is whether in view of (1) Mr.Syed Mustafa having obtained a domicile certificate dated 5-1-1951 from the Chief Presidency Magistrate and (2) his having been enrolled as a voter, it would be correct to enforce against him the order of deportation made against him under the Foreigners Act, 1946.

2. Syed Mustafa was born in 1904 in Iran and is residing in Bombay since 1952. In order to be a citizen under article 5 of the Constitution, a person must have been ordinarily residing in India for a period of 5 years ~~past~~ prior to 26-1-1950 and must also be a domicile of India on that date. There is no question of Syed Mustafa having been residing in India for 5 years before 26-1-1950. The question however is whether on 26-1-1950 he had his domicile in India. Syed Mustafa's domicile by birth was admittedly Iranian. A person can however acquire a new domicile by taking up his fixed habitation in new country. (See section 10 of the Indian Succession Act). But mere residence is not enough to constitute a change of domicile. There must be along with it "the intention to reside there for a period not limited as to time" (King Vs. Foxwell 3 Ch.D.518). In other words there must be a fixed determination to strip himself of his nationality (Cannac v. Attorney General 1904 A.C.287). The Bombay High Court in Santos v. Pinto 17 B.L.R. 715 has observed as follows:-

> "The domicile of origin is that which a person acquires at his birth from his parents and follows the domicile of the parents. It is not necessarily in itself local, that is to say, merely the place of birth. The domicile of origin once ascertained in law clings and adheres to the person until he chooses to divest himself of it by

substituting a domicile of choice for the domicile of origin. The domicile of choice is acquired by a combination of fact with intention. The fact is residence, and the intention is that the residence should be permanent."

Special mode of acquiring a new domicile is as laid down in section 11 of the Indian Succession Act which provides as follows:-

Special mode of acquiring domicile in British India.

" 11. Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government) a declaration in writing under his hand by his desire to acquire such domicile: Provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration."

This does not imply that a domicile cannot be acquired without complying with this section. On the contrary this only provides for a special mode in which the intention of a person who is residing in India, to acquire the Indian domicile is placed beyond doubt. Intention can also be presumed from conduct. It is true that Syed Mustafa has been residing and doing business in Bombay since 1922 and has also acquired immoveable property there. Also in 1941 he had obtained a certificate of domicile from the Chief Presidency Magistrate (Copy attached which has been made from another correspondence sent in this connection by the H.D.) which says that he had his fixed place of habitation in Bombay for 17 years, but it appears that he has not been asserting his status as a British Indian. From the facts as stated in paragraph 4 of the Political and Services Department note at pages 207-10, it appears that Shri Syed Mustafa was treated as a foreigner and was registered as such. He does not appear to have protested or objected to that. All the while he was claiming to be an Iranian national and was paying frequent visits to Iran,

his country of origin and also to Pakistan. He has made vast property in Iran and has been trying to transfer property outside India. He has been making free use of his Iranian passport and has often applied for extension of his residential permit in India from time to time. The last occasion he applied for and was given such extension was 1st March 1950, i.e. after the coming into force of the Constitution. At no stage did he claim to be an Indian citizen nor did he give any indication of having his domicile in India. It is only after he had knowledge directly or indirectly of certain proceedings being taken for his deportation from India that he seems to have manoeuvred to obtain a domicile certificate in January 1951 and also to get himself registered as a voter so that in case of any action for his deportation he might resist it on the ground of his being a citizen of India. His conduct is inconsistent with his claim that he has made India his permanent home or with any declaration that he might have made in 1951 to that effect before the Chief Presidency Magistrate. Prima facie the domicile certificate issued by the C.P.O. does not appear to take into account the previous history of the man. The C.P.O. presumably seems to have merely relied on the intention expressed by Shri Sayed Mustafa to make India his permanent home and his business connections in India and the earlier domicile certificate of 1941. But the fact that he was registered as a foreigner and that he made no attempt till 1950 to assert any right either as having a domicile in India or as a citizen of India would be enough to prove that the domicile

certificate issued by the Chief Presidency Magistrate cannot be given much weight. Also in view of the certificate obtained by him in 1941, it was unnecessary for him to obtain a fresh domicile certificate in 1951, if his conduct since 1941 had been consistent with his status as an Indian subject. It is true that Shri Sayed Mustafa has been entered as a voter in the electoral roll and article 326 of the Constitution contemplates that only citizens of India would be entitled to the suffrage. Shri Sayed Mustafa may, therefore, argue that his entry as a voter in the electoral roll presupposes that he is a citizen of India. But the mere entry of a person in the electoral roll is not a conclusive proof that he is a citizen, as such entry merely entitles him to the suffrage and not to any other rights incidental to the citizenship. Prima facie that entry does not appear to be correct when in fact he was registered as a foreigner. All these facts may be brought to the notice of the Government of India and their instructions sought for the enforcement of the deportation order. If he goes to Court to prevent his deportation on the ground of his being a citizen of India, Government can place all the facts before it and press that in view of his conduct he cannot properly be regarded as an Indian Citizen.'

Sd/- J.R. Dhurandhar
28/8

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No.13980 dated the 31st August 1951.

KAV/27-8.
4 c.

Office of the A.L.A.

STATEMENT OF THE CASE.

Plot No.2B out of Town Planning Scheme No.1 of Ghatkopar was allowed to be used by the Bombay Telephone Co. for a building purpose on the conditions embodied in the Sanad, dated 25th September 1930, under one of which the Co. agreed to pay assessment of Rs.30-12-0 per year. Since the taking over of the Co. by the Government of India, the Director General of Posts and Telegraphs instructed the General Manager, Telephones, not to pay any taxes either to the State Government or the Municipalities in respect of the land as the Government of India was advised by the Ministry of Law that they were not liable to pay any taxes in respect of lands acquired after 1st April 1937. The question for consideration is whether the Posts and Telegraphs Deptt. is liable to pay the non-agr. assessment in respect of Plot No. 2B of T.P.S.No. I. of Ghatkopar.

2. Under section 154 of the Government of India Act, 1935, property vested in His Majesty for purposes of the Government of India was, save in so far as any Central Law otherwise provided, exempt from all taxes imposed by, or by any authority within, a province. The proviso to that section however provided that until any Central Law otherwise provided any property so vested which was immediately before the commencement of Part III of the Govt. of India Act, 1935, liable or treated as liable, to any such tax, should, so long as that tax continued, continue to be liable, or to be treated as liable, thereto. It

is true that the plot in question now vests in the Govt. of India; but it was acquired by the Govt. of India after the commencement of Part III of the Govt. of India Act, 1935. Before the commencement of that part the plot of land was subject to the levy of non-agricultural assessment under the provisions of the Bombay Land Revenue Code, 1879. The question for decision therefore boils down to whether or not the proviso to section 154 applies to after acquired property.

3. Section 154 of the Govt. of India Act, 1935, has been the subject-matter of opinions recorded by the R.L.A. on more than one occasion; but there has been a conflict of opinion on the interpretation of that section. In his opinion No.358-Confl., dated 4-12-1945, the R.L.A.(Shri Lees) while considering the question whether or not the property of the Hatteraley Mill which was taken over by the Govt. of India with effect from 16th October 1940 and which vested in the Crown was liable to Municipal taxation observed as follows:-

"This proviso admits of two interpretations: (1) that the property which has been liable to treated as liable to tax should have vested in the Central Government before the commencement of Part III of the Government of India Act; (2) that it is enough if the property was so liable or treated as liable, no matter whether it vested in the Central Government either before or after the commencement of Part III of the Government of India Act. The second interpreation does not appear to be reasonable since the object of the proviso appears to allow liability of the Central Government existing on the date of the commencement

of Part III of the Government of India Act to continue until any Federal law otherwise provides. Consequently the first interpretation which is in consonance with the intention of the Legislature should be preferred. Since the property vested in the Central Government after the commencement of Part III of the Government of India Act, the proviso to section 154 will it seems have no application."

In 1950, the R.L.A. (Shri Lal) recorded another opinion (No.11959, dated 22-8-1950). The subject-matter of the opinion was whether the railway line owned by the Matheran Steam Tramway Co. which was purchased and taken over by the G.I.P.Rly. Administration in 1948 could be continued to be treated as liable to taxation by the Matheran Municipality. The R.L.A's opinion in that case proceeded on the basis that under the proviso to section 154 it was not necessary that any property to be liable or to be treated as liable to any tax should have been vested in His Majesty before 1st April 1937.

4. Apparently the whole object of the proviso to section 154 of the Government of India Act, 1935, was to preserve the status quo and to give to the Provinces some breathing time to adjust their finances before they lost their sources of revenue. (Vide 299 H.C.Deb 5, col.2179). It was therefore decided to preserve to the Provinces their sources of revenue until such time as the Government of India deemed it proper to intervene and take away by legislation the State's power to tax. The obvious intention was not to disrupt all of a sudden the State's economic polity. Having regard to all these considera-

tion the better view to take appears to be that recorded by the R.L.A. in his opinion of 1950. Article 285 of the present Constitution re-enacts the provisions of section 154 of the Government of India Act, 1935. Clause (2) of the said Article which purports to repeat the proviso to the section shows that until Parliament otherwise provides such property would continue to be liable to the Provincial or State taxation.

5. As the point involved affects the revenue of the State and is of importance on that account and as there has been a conflict of opinions, the Advocate General is kindly requested to advise.

Sd/- J.R. Dhurandhar
25/7.

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 11820 dated the 25th July 1951.

KAU/27-8.
4 c.

No. 11 of 1951.

Advocate General's Chambers,
High Court, Bombay.

O P I N I O N

In this case Plot No.28 of Town Planning Scheme was used by the Bombay Telephone Co., for building purpose under the Sanad dt. 25-9-39 and the company agreed to pay assessment of Rs.30/12/- per year. Thereafter the company was taken over by the Govt. of India. The Director General of Post and Telegraphs instructed the General Manager of the Telephones not to pay any taxes either to the State Govt. or Municipality in respect of the land as the Govt. of India had advised that they were not liable to pay any taxes in respect of any land acquired after 1st April 37.

The short question for consideration is whether a case like this is covered by the Proviso to s.154 of Govt. of India Act of 1935 or after the commencement of constitution by Cl. 2 of article 285 of the Constitution of India which contains a similar provision. Under s.154 property vested in the Central Govt. for the purpose of the Govt. shall, save in so far as any Central act may otherwise provide, be exempt from all taxes imposed by Province or by any authority therein. Under the proviso any property so vested which was, immediately before the commencement of part III of the 1935 Act (i.e. 1/4/37), liable for treated as liable to pay any such tax shall, as long as that tax continues, continue to be liable or to be treated as liable thereto until any Central Act otherwise provided. In this case on 1/4/37 the plot which was granted to the company was paying annual assessment to the provincial Govt. The point for consideration is

whether that liability to pay taxes to the province is altered by reason of the fact that subsequently the property has been taken over by the Govt. of India. The answer to this question will depend upon what is the correct construction of the proviso. The proviso does not, in clear terms, state as to when the property should be vested in the Govt. of India. As it is worded it admits of two interpretations

(1) that the property which was liable or treated as liable to tax should have vested in the Central Govt. before 1/4/37.

(2) that is enough if the property was so liable or treated as liable irrespective of the fact that it was vested in the Central Govt. either before or after 1/4/1937.

No doubt the proviso is not free from ambiguity; but in cases like this where it is open to double interpretation that interpretation should normally be preferred which is in consonance with the intention of the Legislature. In this case the main purpose of s.154 was to provide that the property vested in the Central Govt. which were liable should not be made subject to payment of provincial taxes; and by the proviso it was intened that such of the properties then vested in Central Govt. which were paying provincial taxes should continue to be liable to the payment of such taxes. If the proviso is given a wider meaning and is made applicable to all properties whether vested before or after 1/4/1937 the scope of the main body of the sec. will be considerably curtailed. In such cases

the application of the main body of the section will be restricted only to properties which though vested in the Central Govt. on 1/4/37 were not liable or to be treated as liable for provincial taxes or to properties which are constructed for the first time by the Central Govt. after 1/4/37. By so interpreting the proviso it will not be ~~it~~ possible to carry out the real intention of the Legislature in enacting s. 154."

In my opinion only such properties which were vested in the Central Govt. for the purpose of Govt. before 1/4/37 and were then liable to provincial taxes will continue so liable under the proviso to s.154. The properties which became vested in the Central Govt. for the first time after 1/4/37 will not be covered by the proviso.

Sd/- .....
20th August 1951.
THE ADVOCATE GENERAL OF BOMBAY.

KAN/37-8.
4 c.

Office of the R.L.A.

A copy of the Advocate General's opinion along with a copy of the statement of the case is sent herewith.

Sd/- J.R. Thuraisingham
28/8

U.R. to R.D. No.13805 dated the 29th August 1951.

RAH/27-B.
4 c.

OFFICE OF THE R.L.A.

In order to claim citizenship of India Mr. Semmirtilich would be required to prove, besides domicile, that he has been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution. He has been residing in the Bombay State only since February 1946 and obviously he does not fulfil the required condition. His interment at the Interment Camp cannot be taken as residence in India as the stay was not voluntary. "Whether the term 'residence' be taken in the sense of domicile, or of abode, it implies a place where a party is situated through choice, and where in some conceivable manner his personal belonging would be the more readily found; and neither in its legal nor in its popular meaning is the word "residence" satisfied by an incarceration in any particular place. It is impossible to hold that a person resides in the prison where he was imprisoned" (Aiyar's Law Lexicon, p. 1110; Cf. also R.L.A's opinion No. 10554, dated 3rd July 1951). In the circumstance Mr. Semmirtilich cannot be held to be an Indian Citizen.

Sd/- J.N. Khurandhar
S/D

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No.14534, dated the 12th September 1951.

KAH/27-8.
4 c.

19740 of 22-9-51.

Submitted with reference to E.D. note at pp. 15-16 ante. Please see R.L.A.'s Opinion No. 13744, dated 27-8-1951 (at pp. 11-13 ante), in which the R.L.A. had expressed the view that the extension of the orders of Government granting concessions relating to age-limit and domicile to non-muslim refugee students from Pakistan would offend against article 15(1) of the Constitution of India. The question now raised for consideration is whether the presumption made by the E.D. that the question of domicile does not now arise in case of displaced persons is correct. (vide para 3 of E.D. note at p. 15).

Id/- D.V. D.
25-9-51.

D.S. (Opinion)

x

Id/- R.T. K.
1/10

R.L.A.

KAN/28-8.
4 c.

Office of the R.L.A.

All the refugees who have acquired the citizenship of India under Article 6 of the Constitution would be deemed to have domiciled in India and consequently the question of the domicile of such refugees residing in the Bombay State would not arise. The view taken by the Education Department is correct.

Sd/- J.R. Dhurandhar
3/10

Remembrancer of Legal Affairs.

U.R. to E.D.No.15730, dated the 4th October 1951.

KAN/28-8.
4 c.

Legal Department.

R.I. No.20158 dt.28-1-1951.

Submitted.

Please see the Passport Office note at pp.51-53 ante and the note of the Passport Officer below it. The material facts are these: Mrs. Mathews, who is a Dutch subject by birth, married an Indian at Glasgow in 1949 and came to India on a Dutch passport in August 1950. She was registered as a foreigner and was permitted to remain in India till 12-11-1950. She was, however, granted extension of one year at her request on the ground that she wanted to sue her husband for divorce. It appears from the papers that though no divorce has been taken so far, she has left her husband's protection and she is now staying in Bombay. She has applied for an Indian Passport to go to United Kingdom for sight-seeing. The question for consideration is whether she can be granted an Indian Passport.

Id/- H.P. Rege
3/10

D.S.(Civil)

Id/- R.T.K.
3/10

Addl. Secy.

KAN/28-3.
4 c.

LEGAL DEPARTMENT.

Citizenship

Constitution of India. Art. 5.

So far as domicile is concerned, it is clear that Mrs. Mathews will have the same domicile as that of her husband notwithstanding the fact that she is staying separately from her husband (cf. Additional Secretary's opinion No. 6907y dated the 1st May 1951). But domicile alone will not confer citizenship on Mrs. Mathews. According to Article 5 of the Constitution, besides domicile a person must satisfy any one of the three conditions mentioned in clauses (a), (b) and (c). As Mrs. Mathews does not satisfy any of those conditions, she is not a citizen of India and consequently she will not be entitled to get an Indian Passport.

Sd/- B.D. Nirchandani

Additional Secretary to Government.

U.O. to Passport Office, No. 15819, dated the 5th October 1951.

7 RAII/28 -8.
4 c.

20418 dt. 3-10-51.

Submitted with reference to Chief Secy's note at p. 26 ante. By an agreement entered into between Bai Indirabai, mother and guardian of the minor talukdar of the taluka of Khijadia (in Saurashtra) and the Rajpramukh of that State the former has surrendered to the State of Saurashtra with effect from 1st February 1951 all the superior proprietory rights in all the lands of the taluka of Khijadia (including the right to recover rent in cash or kind from tenants) in favour of the State of Saurashtra. It appears that the taluka includes a village known as Venivadar which by para. 5 of the Provinces and States (Absorption of Enclaves) Order, 1950, read with the third Schedule to the Order has been directed to be administered as if it formed part of the absorbing unit (i.e. Bombay State). In view of the agreement the Saurashtra Govt. requests that instructions might be issued to the Collr. of Amreli to manage it on behalf of the Saurashtra Govt. The P. & S.D. considers that in view of the Provinces & States (Absorption of Enclaves) Order, 1950, the Saurashtra Govt. has no claim over the village and no superior proprietory rights vest in that Govt.; and that the agreement executed by that Govt. with the Thakor of the village is not binding on the Bombay Government. Before writing to the Saurashtra Govt. accordingly the H.L.A. is requested to advise.

Id/- D.N. D.
8-10-51

D.S. (Opinion)

KAN/28-8.
4 c.

OFFICE OF THE R.L.A.

The agreement which the talukdar executed in favour of the State of Saurashtra amounts to the cession of whatever sovereignty the talukdar possessed. Under clause 5 of the Provinces and States (Absorption of Enclaves) Order, 1950, the village in question as an enclave has become the part of the Bombay State. The Saurashtra Government cannot therefore retain any proprietory right or any other right in or over the village in dispute. The view taken by the P. & S.Department is correct.

Sd/- J.P. Dhurandhar
11/10

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No.16227, dated the 13th October 1951.

KAH/28-8.
4 c.

Office of the R.L.A.

Just before the commencement of the Constitution, the Governor General made rules under section 241 and section 247 of the Government of India Act, 1935, called the Indian Civil Administrative Cadre Rules, 1950. As pointed out by the P. & S.D., under these Rules was formed an All India Service Cadre which was to be manned inter alia by the I.C.S. and I.A.S. officers. Under article 313 of the Constitution, these Rules continue to be in force until other provision is made in this behalf under the Constitution. The power to make other provision under the Constitution is conferred by article 312. Under that article, on the passing of the necessary resolution by the Council of State, Parliament is authorised to make law to provide for the creation of one or more all-India services common to the Union and the States. Under the said article Parliament can make a law subject to the other provisions of Chapter I of Part XIV for regulating the recruitment and the conditions of the service of persons appointed, to any such service. The law to be made by Parliament under article 312 would therefore be subject to the provisions of article 314. That article guarantees to the members of the I.C.S. appointed by the Secretary of State or the Secretary of State in Council the same conditions of service as respects remuneration, leave and pension and the same rights as respects any disciplinary matters or rights as similar thereto as changed circumstances may permit as those persons were entitled to immediately before the commencement of the Constitution. Under this article i.e. article 314 the

conditions of service to which the members of the I.C.S. are entitled are as regards remuneration, leave and pension. If therefore, any law is made by Parliament under article 312 or any rules are made in pursuance of that law for forming a joint cadre for Bombay and Saurashtra, such law or rules would not be repugnant to the provisions of article 314 and therefore the I.C.S. officers who are already members of the I.C.A. cadre can without any legal objection be the members of such joint cadre.

Sd/- J.R. Dhurandhar
23/9

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No.211-L, dated the 24th September 1951.

KAN/28.8.
4 c.

Office of the R.L.A.

It does not appear that a joint cadre between Saurashtra and Bombay can be formed, as proposed, by mere executive directions. As rightly pointed out by the Secretary, Home Department, the Indian Civil Administrative Cadre Rules, 1930, do not contain any condition as to such joint cadre. Those rules continue to be in force under article 313 of the Constitution until other provision is made under the Constitution by enacting a law as is pointed out in R.L.A's opinion No.211-L, dated the 24th September 1951.

Sd/- J.R. Dhurandhar
10/10

Remembrancer of Legal Affairs.

U.R. to P. & S.D.(Thro' H.D.)No.857-Confl.,
dated 10th October 1951.

KAN/28-3.
4 c.

Legal Department.

By marriage Mrs. Mathews, who was a foreigner gets only the Indian domicile, which is the domicile of her husband (see section 15 of the Indian Succession Act). But as pointed out before, domicile alone is not sufficient to confer citizenship under Article 5 of the Constitution. As pointed out in the Additional Secretary's opinion at page 55 ante, Mrs. Mathews has at present the same domicile as that of her husband and even after divorce she would retain that domicile until she changes it (Dicey's Conflict of Laws, p.111)

Sd/- B.D. Kirchandani

Additional Secretary to Government.

U.R. to Passport Office, No. 16653, dated the 19th October 1951.

KAM/28-8.
4 c.

Legal Department.
L.D:N.I.No.21333 dt. 15-10-51.

Submitted.

In his opinion No.3727 dated the 20th June 1951, the R.L.A. had observed,

"The case of Shri Goganian is similar to those of Shri T.E.Sherbanee and Miss Sherbanee considered by the R.L.A. in his opinion Nos. 1180 dated the 18-1-1951 and 1632 dated the 27th January 1951 and there would be no objection to recognising him as an Indian citizen if Government is satisfied that he had abandoned his Lebanese nationality at the commencement of the Constitution."

On 5th July 1951, the Passport Officer consulted Government of India, Ministry of External Affairs, whether Shri Goganian can be granted an Indian passport and that Ministry informed him as follows:

"If the applicant retained his Lebanese nationality at the time of the commencement of the Constitution his case falls under the mischief of Article 9 of the Constitution, and as such he is not eligible for Indian citizenship and consequently an Indian passport cannot be issued to him."

The Commissioner of Police has reported that Mr. Goganian was still registered as a Lebanese national on 26-1-1950; and prima facie he had retained that nationality on that date. The passport office, however, observes as follows:

"The cases of Shrimati Aziza Sherbanee and Shri E.D.Sherbanee are put up. It will be seen that in neither of these two cases the R.L.A. raised the question of retention of their original nationality at the commencement of the Constitution. Shrimati Aziza Sherbanee's registration as a foreigner was cancelled after 26-1-1950. As Shrimati Sherbanee was granted an Indian passport it would not be correct to refuse an Indian passport to Mr. Goganian on the ground that he did not abandon his Lebanese nationality at the commencement of the Constitution." L.D. is requested to advise.

x x x x

Id/- H.P. Rege 18/10 P.T.O.

D.S. (Civil) Id/- R.T.K.
18/10

Addl. Secy. Id/- D.D. Murchandani
18/10

R.L.A.

KAH/28-8.
4 c.

Office of the R.L.A.

Citizenship.

Constitution of India.

Article 9.

In the cases relating to Miss Sherbanee and Shri M.C.Sherbanee the point about their retention of their former nationality was not specifically brought to the notice of the R.L.A. and was not, therefore, discussed. In the case of Miss Sherbanee, she was not in India at the commencement of the Constitution and there was no question of her retaining her foreign nationality by being registered as a foreign national. Mr. Goganian was registered as a Lebanese on the relevant date and in the circumstances, he must be deemed to have retained his original nationality at the commencement of the Constitution. Consequently his case falls under Article 9 and he cannot as advised by the Ministry of External Affairs be deemed to be an Indian citizen. The advice tendered by that Ministry may be followed.

Sd/- J.R. Khurandhar
20/10

Remembrancer of Legal Affairs.

U.R. to Passport Office No. 16742, dated the 22nd October 1951.

RAP/22-3.
4 c.

Legal Department.

L.D...I. No.21350 dt. 16-10-51.

Submitted.

Miss Joyce Ezekiel Hillel, who was born in Bombay and (probably) an Indian by birth was granted a British Indian passport in 1947 for travel to Palestine. She went to Israel and got married to one Daud Asher who is an Iraqi national by birth. She returned to India on 6th April 1951 and has been residing in Bombay since then. She intends to go to Europe and U.S.A. and has applied for an Indian passport. She contends that her husband is a stateless person at present and that though she has married him, she has chosen to retain her Indian nationality. On these facts, the Passport Officer wants L.D. to advise whether she can be deemed to be an Indian citizen.

Sd/- N.P. Nayar
13/10

KAN/28-3.
4 c.

Office of the E.L.A.

On marriage Mrs. Asher acquired the domicile of her husband. At the commencement of the Constitution i.e. on 26th January 1950, she had no Indian domicile. She does not, therefore, satisfy the conditions as to domicile in Article 5 of the Constitution and she is not an Indian citizen under that Article. Moreover, it does not appear that she has taken advantage of Article 8 by getting herself registered as a citizen of India by the diplomatic or consular representative of India, if any, in Israel. In the circumstances, she cannot be considered to be an Indian citizen under that Article either. Mrs. Asher has, however, referred to a letter from the Ministry of External Affairs, New Delhi, in her letter at p. 29. That letter is not forwarded with these papers and it is not known how far that letter is relevant. The Passport Officer also appears to have made a reference to the Government of India and it may be desirable to await the advice from that Government.

Sd/- J.R. Dharandhar
20/10

Remembrancer of Legal Affairs.

U.O. to Passport Office No. 16760, dated the 22nd October 1951.